No. 83-810

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

IN RE: NATHAN YORKE, TRUSTEE IN BANKRUPTCY, THE SEEBURG CORPORATION

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

WAREHOUSE, MAIL ORDER, OFFICE, PROFESSIONAL AND TECHNICAL EMPLOYEES UNION LOCAL 743, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Intervenor-Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

INTERVENOR'S OPPOSITION TO PETITION

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QUESTIONS PRESENTED

1. Whether the Court of Appeals properly applied the bargaining requirements and remedies of the National Labor Relations Act to the Trustee in bankruptcy?

2. Whether the Petitioner was properly notified of and given the opportunity to litigate the facts and theories on which liability was ultimately imposed?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 709 F. 2d 1138 (A. 70a-94a). The decision and order of the National Labor Relations Board is reported at 259 NLRB 819. (A. 41a-50a)

STATUTES INVOLVED

In addition to those statutes set forth in the Petition, also involved are Section 8(d), 29 U.S.C. § 158(c), and Section 10(c), 29 U.S.C. § 160(c), of the National Labor Relations Act, set forth in the Appendix hereto.

COUNTER-STATEMENT OF THE CASE

On February 4, 1980, Nathan Yorke was appointed by the Bankruptcy Court to act as Trustee in Bankruptcy for the estate of the Seeburg Corporation. The initial petition had sought reorganization under Chapter 11 of the Bankruptcy Act. At the time of the Trustee's appointment, there were approximately seven employees working who were represented by the Union. In the afternoon of the day of his appointment, Yorke paid a visit to the plant. On February 8, 1980, a first creditor's meeting was held. On February 11, 1980, the Bankruptcy Court issued an order authorizing the Trustee to curtail operations based upon a motion filed the same date by Yorke. On the same day that he filed the motion and that the order was granted, Yorke shut down the facility without giving any notice to the Union that such action was contemplated. (A. 22a-24a)

On February 15, 1980, the Union's attorney sent a letter to Yorke making certain inquiries and demanding "an immediate meeting be set up so that we can discuss the decision and effects that your action has had on our bargaining unit employees." (A. 25a) Yorke's reply, dated February 25, 1980, answered the questions but did not respond to the demand for a meeting. (A. 26a)

The Board's Administrative Law Judge concluded that Yorke's failure to give the Union prior notice of the closure was not justified, (A. 32a) and continued:

> In any event, Yorke failed to bargain with the Union about the shutdown's effect on employees even after it found out about the shutdown and

> made a written "demand that an immediate meeting be set up so that we can discuss the . . . effects that your action has on our bargaining unit employees." (A. 33a)

Among the acts which the Administrative Law Judge, the Board and the Court of Appeals found to have constituted this failure to bargain were Yorke's failure to respond to the request for the meeting, Yorke's acquiescence in his attorney's statement that there could be no give and take in bargaining, Yorke's insistence on a stenographic transcript of any bargaining sessions notwithstanding the Union's opposition and Yorke's statement in August of 1980 that he had no authority under the Bankruptcy Act to make severance payments. (A. 33a, 43a, 79a-80a)

In the bankruptcy proceedings, $55,000 was segregated by agreement of the bankrupt company, the Trustee, the creditors' committee and the purchaser to satisfy the potential claim arising from the National Labor Relations Board litigation. (A. 64a-66a) The plan of liquidation which was approved by the Bankruptcy Court included the sequestered amount. (A. 67a)

The Board's Administrative Law Judge concluded that the Trustee had violated the Act not only by failing to notify the Union of the decision before February 11, but also by his actions from February 15 through August. However, the Administrative Law Judge failed to order a back pay remedy. The Board upheld the findings of illegality but granted the limited back pay remedy set forth in *Transmarine Navigation Corp.*, 170 NLRB 389 (1968). The Board's remedy requires only that the Trustee pay a minimum of two weeks' back pay to the employees who were on the payroll on the date when the plant was closed. The back pay stops running when the Trustee has bargained to agreement on subjects pertaining to the effects of the discontinuance of operations, a bona fide bargaining impasse has been reached or the Union fails either to request bargaining or to bargain in good faith. (A. 47a) Contrary to the assertion of the Trustee, (Pet. 4) the

Board's order does not continue until agreement or impasse is reached on a "collective bargaining agreement."

The Court of Appeals found that a true emergency had existed between February 4 and 11, justifying the Trustee's failure to give notice to the Union prior to the shutdown. However, the Court of Appeals found no justification for the subsequent failure of the Trustee to bargain with the Union and enforced the Board's *Transmarine* remedy, except that the Court provided for prospective effect only. (A. 78a-79a, 81a-84a)

REASONS FOR DENYING THE WRIT

I. This Case Presents No Conflict Between The Bankruptcy Act and The National Labor Relations Act.

The Petitioner does not assert that any issues presented in this case implicate the issues presently before this Court in *Bildisco*, 682 F.2d 72 (3d Cir. 1982), cert. granted, 74 L. Ed. 2d 992 (1/17/83). There is no issue here as to a Trustee's right to reject an executory agreement. All that is involved here is the Trustee's obligation to "meet at reasonable times and confer in good faith", 29 U.S.C. Sec. 158(d), concerning the effects on the employees of the decision to shut down operations. See *First National Maintenance Corp.* v. *N.L.R.B.*, 452 U.S. 666, 677 fn. 15, 681-682, (1982).

Nor does any conflict between the two statutes appear anywhere but in the argument of the Trustee. Yorke does not allege that he is immune from the reach of the National Labor Relations Act. (See Pet. 8) Rather, he claims that there is a "conflict between the Board's demands and the Trustee's duty" which should be resolved in the first instance in the Bankruptcy Court. (Pet. 9) There is no such conflict. The Board's demands are only that the Trustee bargain about the effects of plant closure. The Trustee's duty is to abide not only by the Bankruptcy Act, but also by the National Labor Relations Act, a point conceded by Yorke. (Pet. 8) That duty includes bargaining with a Union upon request concerning

the effects of his decision to shut down operations. Thus, the Board's demands and the Trustee's duty are the same.

The Petitioner, in colorful language, sets up straw men. He contends that he is not required to continue operations except as an aid to liquidating the estate. (Pet. 8) The Court did not require him to continue operations; the Court required him only to bargain with the Union about the effects of the discontinuance of operations after the plant had shut down. He asserts further that he is not to play the role of "Lady Bountiful at the expense of creditors." (Pet. 8) He ignores the quoted portion of *In re Brada Miller Freight System*, 702 F.2d 890, 897 (11th Cir. 1983) that the critical interests in a bankruptcy proceeding include not only creditors, but also shareholders and employees. (See Pet. 9) Certainly, where, as here, there has been a judgment on behalf of those employees, they become creditors as much as anyone else. Even before judgment, their interests are "critical." *Brada Miller Freight System, supra.*

What the Petitioner refers to as the Board's "demands" is in reality the Board's remedy, as modified by the Court. Yet, interestingly enough, the Petitioner apparently abandons his "penalty" theory by conceding a "rationale" for a *Transmarine* remedy. (Pet. 14) He argues only, again for irrelevant reasons, that the rationale does not apply to this case. The application of a justified remedy to a particular fact situation hardly calls for the exercise of this Court's extraordinary writ.

Moreover, the Board, pursuant to Section 10(c) of the Act, has broad remedial powers and the Courts have usually approved the *Transmarine* remedy, as did the Court here.

Nothing in the Court's order requires the exhaustion of the $55,000 which has been set aside, contrary to Petitioner's assertions. (Pet. 14) Yorke could have kept the back pay to a minimum simply by doing what the Board and the Courts have required, namely, immediately bargain with the Union concerning the effects of the plant closure until agreement or impasse had been reached.

The remaining straw men set up in the Petition are even more extraordinary. It is asserted that there were no "victims" of the Trustee's unfair labor practices. (Pet. 13) Surely, the affected employees who did not have the benefit of bargaining for severance pay, reinstatement rights, seniority in the event of recall, etc., were no less than such "victims." Yorke also misspeaks when he asserts that he had no power to pay "back pay" or "severance pay." (Pet. 13) He may not have had the power to agree to pay those amounts without Court order, but he surely had the power to bargain about them and to seek Court authorization. Yorke also seems to claim that such items as severance pay, reinstatement rights, seniority for recall, etc., are not "conditions of employment" and therefore, not mandatory subjects of bargaining. (Pet. 13-14) First, this argument has never been raised below and therefore is not appropriate for consideration now. Second, this Court has held that bargaining about the effects of a shutdown are mandatory subjects of bargaining. *First National Maintenance Corp.* v. *NLRB, supra.*

Accordingly, this case does not present any conflict between the application of the Bankruptcy Act and the National Labor Relations Act which requires this Court's writ.

II. Petitioner Was Fully Advised Of, And Litigated, The Grounds On Which Liability Was Premised.

While the Court of Appeals found that the emergency which existed between February 4 and February 11 justified the Trustee's failure to notify the Union in advance of his decision to close, the Court found that the subsequent refusal to bargain was not justified by any emergency or other conditions.

Yorke contends that he was never put on notice that his acts subsequent to February 15 were being contested. This is remarkable. First, the Amended Complaint sets forth that the Trustee terminated operations "without prior notice to the Union *and* without having afforded the Union an opportunity to negotiate and bargain concerning the effect of said

conduct." (A. 6a) As the Court of Appeals properly found, two premises are set forth in the quoted portion of the Amended Complaint, the absence of prior notice and refusing the Union an opportunity to bargain thereafter. Second, if that was not clear enough, the matter of the Trustee's conduct subsequent to the Union's demand of February 15 was fully litigated. (A. 25a-34a) It does not appear that Yorke objected at any time before the Administrative Law Judge, before the Board or before the Court of Appeals, prior to his petition to the Court for rehearing, that he had not properly been put on notice of the issues which he litigated. Thus, even if the complaint itself did not put the Trustee on notice, he was certainly on notice at the time that he litigated the issues. Third, as noted, he had never raised the issue in a timely fashion and this Court should not pass upon it.

Accordingly, there is no absence of due process in this case requiring the granting of a writ.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX
NATIONAL LABOR RELATIONS ACT, AS AMENDED

Section 8

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession:. . . .

Section 10

(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter: *Provided,* That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him:. . . .